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Supreme Court, U.S.

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No. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

MICHAEL EUGENE THOMPSON, Petitioner

v.

STATE OF ALABAMA, Respondent

PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF ALABAMA

PETITION FOR WRIT OF CERTIORARI

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67

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QUESTIONS PRESENTED

1. Whether the State of Alabama's inflexible statutory limitations on funding for representation of indigent defendants in capital cases -- and the chronically inadequate representation which inevitably results from that statutory scheme -- violate the Fifth, Sixth and Fourteenth Amendments to the Constitution of the United States where, as here, such strict funding limitations prevented inexperienced appointed counsel from researching fundamental questions of criminal law in capital cases, from having the facts of the case investigated, from developing Petitioner's defenses and strategy, and from pursuing a meaningful appeal?



2. Whether the admission into evidence of Petitioner's confession violates the Fifth, Sixth and Fourteenth Amendments to the Constitution of the United States, where the State's only evidence of Petitioner's waiver of the right to counsel and of the voluntariness of his confession was limited to the events of the last few minutes before the confessional interrogation began, where the State presented no evidence of lack of coercive conduct during the prior 24 hour custodial period, and where uncontested oral and written evidence established both that the Petitioner repeatedly asserted his rights to remain silent and to obtain counsel, and that the confession was obtained in response to a coercive charade orchestrated by the State?



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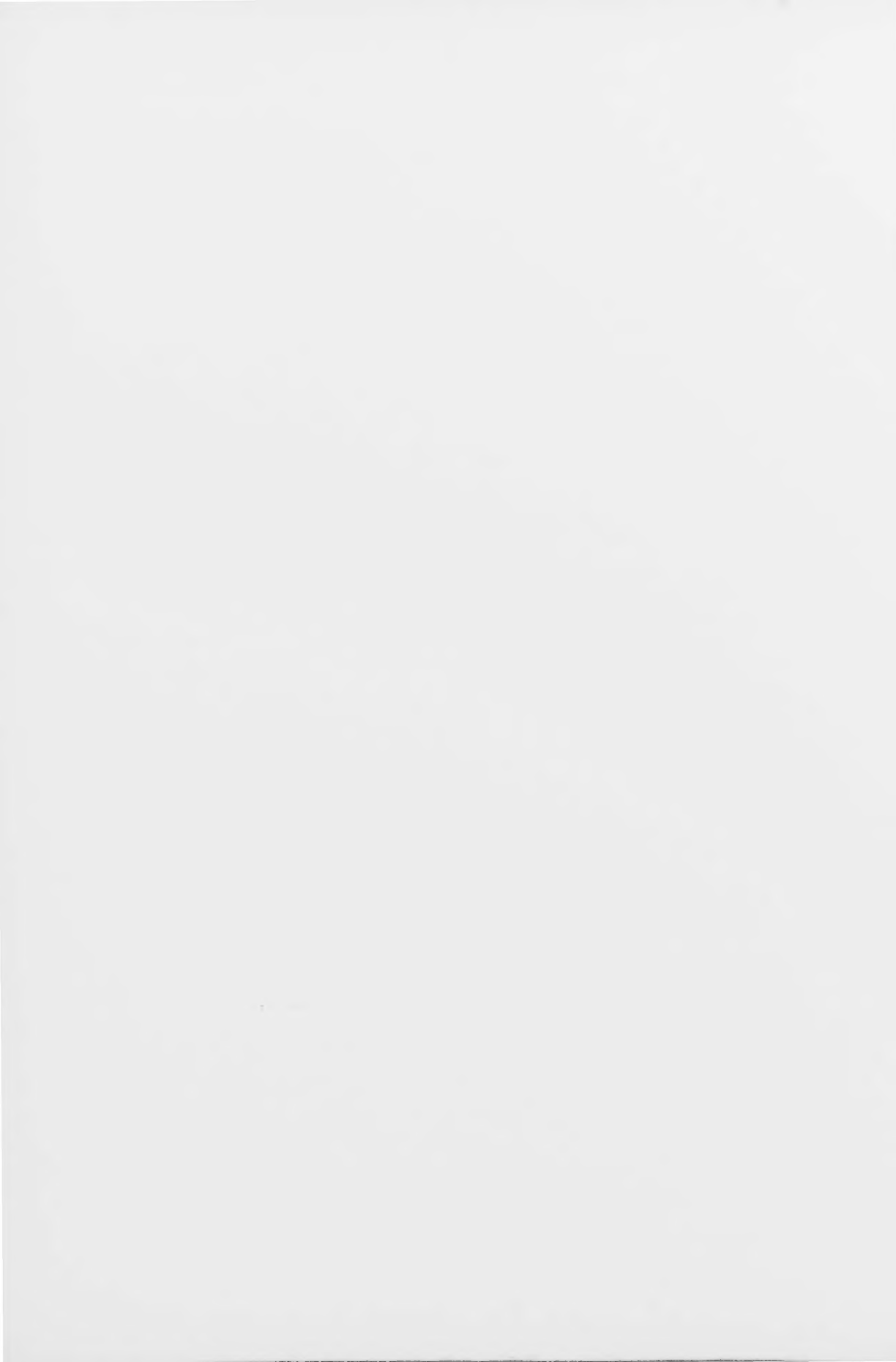
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GROUND8 OF SUPREME COURT JURISDICTION

The Supreme Court has jurisdiction to review the decision of the Alabama Supreme Court dated June 21, 1991, by writ of certiorari based on 28 U.S.C. §1257.

Petitioner challenges the validity of that final decision based on the ground that it is repugnant to the Constitution of the United States and Petitioner's rights thereunder.

APPLICABLE CONSTITUTIONAL PROVISIONS AND STATUTES

Applicable Constitutional provisions and statutes, identified here pursuant to subsection Rule 14.1(f) of this Court, include: the Fifth, Sixth and Fourteenth Amendments to the Constitution of the United States; and the provisions allowing for appointment and compensation of



counsel contained in the Code of Alabama 1975, Title 15, Chapter 12, Article 2, et seq. As provided in Rule 14.1(f), these Constitutional provisions and statutes are laid out in full in the Appendix.

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PETITION FOR WRIT OF CERTIORARI

INTRODUCTION

Petitioner Michael Thompson respectfully requests that a writ of certiorari issue to review the decision of the Supreme Court of the State of Alabama denying Petitioner's claim for post-conviction relief.

This petition is based on violations of Petitioner's fundamental constitutional

rights in two areas which bear on the fairness of the trial afforded to Petitioner. First, Petitioner's appointed trial counsel, who were inexperienced in defending capital cases, were unprepared to defend Petitioner at trial due to the \$1,000 limitation on their pre-trial fees imposed by state law. As a consequence, counsel did not commit the necessary time and effort to the case. They thus misunderstood the fundamental legal issues applicable to the proceeding, ignored available constitutional defenses, and offered an ill-conceived defense that in itself assured that Michael Thompson would be convicted and sentenced to death. These same financial constraints also prevented counsel from conducting an investigation of the case, in spite of their awareness of the fundamental importance of such an investigation in defending Petitioner.

This combination of an inability to spend time in preparation for trial as well as a lack of funds to retain investigators

and expert consultants, or to cover their own expenses in pursuing Petitioner's defense, also caused counsel to completely fail to pursue many available defenses. Among these neglected defenses were those related to the lack of corroboration of the State's case and defendant's alibi, the coerced confession, Petitioner's diminished mental capacity arising from his father's violent death and his subsequent alcohol abuse, and numerous factual matters in mitigation of his sentence.

Second, the uncontested evidence shows that the confession offered in the trial court as the primary evidence against Michael Thompson was coerced over a period of more than 24 hours from Friday to Saturday evening. During this period, Petitioner had repeatedly asserted his right to remain silent and asserted his right to counsel, and had refused to sign a document waiving those his rights, which fact was duly noted by the sheriffs. In spite of those assertions of

rights, the questioning periodically recurred until the sheriffs involved resorted to a plan designed to trick and coerce Petitioner into confessing. Despite the foregoing, the State was permitted to establish the putative voluntariness of the confession by offering evidence of Michael Thompson's conduct and his treatment by the sheriffs during only the last few minutes prior to his confessional interrogation, after his will had been broken. At the hearing for post-conviction relief, the State, after finally being forced to comply with the Brady rule by producing the written evidence of Petitioner's refusal to waive his constitutional rights, and with full knowledge of Petitioner's testimony and arguments, nevertheless still failed to present any testimony to contradict the coercive tactics described by Petitioner to the Court.

STATEMENT OF THE CASE

On January 5, 1985, Shirley Franklin, Michael Thompson's former live-in girlfriend, who had recently left Petitioner to return to her husband, gave a statement to the police in response to a reward offer. In the statement, she claimed that Michael Thompson had committed a December 10, 1984 robbery of a convenience store, kidnapped the store's clerk, Maisie Gray, and later shot her. Michael Thompson was arrested early in the evening of Friday, January 5, 1985, and was incarcerated without arraignment or other access to the judicial system until the following Monday.

A. THE COERCED CONFESSION

Petitioner testified at trial that shortly after being arrested he not only asserted his right to remain silent, but also invoked his right to counsel. This testimony was undisputed. It is further supported and corroborated by a waiver of rights form dated January 5th, 1850 hours, which Petitioner

refused to sign and which refusal was entered on the form by the sheriffs then present. The State did not call the officers whose signatures appear on the refused waiver, or any of the other police officers who were present during the 24 hour period leading to his confession, to rebut Petitioner's testimony. Moreover, this essential corroborating document was withheld by the State in defiance of Petitioner's specific motion to produce and thus was not available for consideration by the trial court.¹

The uncontested evidence further shows that, after refusing to waive his rights, Petitioner asked to make a phone call and again requested an attorney. Both

¹ The trial court granted petitioner's motion to produce, which included requests for "any and all statements made by Defendant herein Michael Eugene Thompson," "any and all police reports and detective bureau reports" and "all evidence or information in possession of police or prosecutor which tends to exculpate Defendant or which aids in the preparation of a defense." Nevertheless, the State withheld the waiver form until further requests were made during Petitioner's post-conviction proceedings.

requests were refused. After a sleepless night, Petitioner was repeatedly interrogated on January 6, 1985, but continued to refuse to waive his rights or to make a statement, continued to request an attorney and continued to be denied access to a telephone.

During the afternoon, A.G. Lang, a police investigator from outside the county who was acquainted with Petitioner, was brought in to make a personal appeal to Thompson. Lang misinformed Petitioner that some third party had made statements which led to his arrest -- although it was in fact Shirley Franklin who had implicated Petitioner -- and that the police had arrested Franklin for the murder and had her in custody. Lang moreover led Petitioner to believe that Franklin would be tried if Petitioner did not confess, that the authorities had sufficient information to assure her conviction, and that, because of her prior felony conviction record, she would be sentenced to death once convicted.

Significantly, Lang failed to rebut any of these facts when called to testify.

After this conversation, Petitioner asked to be allowed to talk with Shirley Franklin. Brought in weeping and disheveled, Franklin was in handcuffs, although she was not then, nor had she ever been, under arrest. After an emotional discussion alone with Franklin -- in which she repeatedly stated that she would be tried and put to death if Petitioner did not confess -- Petitioner agreed to save his onetime girlfriend by confessing to the murder. In exchange, Petitioner asked only that Shirley Franklin get him a lawyer. She never did. Shortly thereafter, Petitioner submitted to a confessional interrogation.

When that recorded confession was offered into evidence at trial, the only testimony offered by the State on the question of voluntariness was given by Sheriff McDowell, who, by his own admission, had no personal knowledge of the

circumstances leading up to the confession and was merely brought into the room at the last moment to take the confession. Sheriff McDowell's statement that neither he nor anyone in his presence used threats, coercion, or persuasion to compel the statement therefore should have been given no weight.²

Despite these facts, the trial court found that the confession was voluntarily made and admitted it into evidence.³

² The taped interrogation was presented in an arranged and incomplete form at trial, since the tape recorder used to tape it was turned on and off repeatedly during the questioning.

³ A second brief statement alleged to have been made in the presence of investigator Larry Fowler on the afternoon of January 8, 1985, literally moments before Thompson was to see his appointed counsel for the first time, was also improperly admitted. Investigator Fowler admittedly failed to advise Petitioner of any of his rights and it was shown that, after Fowler later wrote down the alleged statement, Petitioner was never given an opportunity to read over the alleged statement, or in any way given the opportunity to determine its accuracy. The State also failed to produce the other witness to the alleged conversation, Investigator Robert Walker. Petitioner
(continued...)

By the time of trial, Petitioner had learned of the deceptive charade that had led to his agreement to confess. After the confession was admitted at trial, Thompson, consumed with rage and betrayal, did not attempt to clear himself when called to testify, but instead only sought to implicate Shirley Franklin. Thus, Petitioner's trial testimony itself was tainted as the direct result of the earlier coercive tactics utilized by the State.

B. CONDUCT OF COUNSEL

From the moment of their appointment on January 8, 1985, the conduct of Michael Thompson's reluctant counsel severely prejudiced his defense.

John Dobson and B.J. McPherson were appointed as co-counsel for Michael Thompson's trial under authority of Alabama Code Title 15, Chapter 12, Article 2. That statute provides that appointed counsel in

³(...continued)
vigorously denied ever making such a statement.

capital cases may each be paid a maximum of \$1,000 for pre-trial preparation at the rate of \$20 per hour. The statute does not permit additional pre-trial compensation even in extraordinary cases. While the statute does give the court discretion to approve reimbursement for "reasonable" expense requests made in advance, in practice such funds are rarely forthcoming, so that, in the case below, appointed counsel did not bother to make such requests. The reality of inadequate funding was graphically explained by one of the appointed counsel during questioning at the post-conviction hearing, when he was asked why he did not hire an investigator: "I would have had to pay for it out of my own funds, and I had three kids in college, and I couldn't afford it."⁴

⁴ Alabama's statutory scheme does not limit the number of hours which an appointed attorney can be compensated for during trial, but he is limited to a rate of \$40 per hour. On appeal, another \$1,000 limit at \$20 per hour applies.

The inevitable results of such a system are borne out by what happened to Michael Thompson. However well intentioned counsel may have been, their lack of experience, lack of funding, and lack of time commitment ensured that Michael Thompson was denied adequate or meaningful representation.

At the post-conviction proceeding, appointed counsel Dobson testified that "[t]he overall strategy of the trial was one of diminished capacity, limited participation, addiction to drugs and alcohol, and remorse." This explanation suggests that counsel intended to attempt to avoid conviction and a capital sentence by showing that Michael Thompson lacked intent, did not himself pull the trigger, and acted to the extent he did only as the result of the mitigating circumstance of his personally tragic life and substance addiction. However, though counsel suggested this approach in hindsight, they did not pursue it in the trial, largely because they were

lacking in experience in such cases, uncompensated, unsupported financially, and, as a result, wholly unprepared.

In opening argument, inexperience and lack of preparation were evident in counsel's stumbling, harmful emphasis of the fact that they were appointed and did not represent Mr. Thompson by choice, their declaration that this was a terrible crime with gruesome evidence, and their failure to annunciate any reasonable defense or given any other indication that any trial strategy was ever developed. Defense counsel went on to argue that the evidence would show that Thompson committed robbery and kidnapping, but that Shirley Franklin had pulled the trigger. However, under Alabama law, Petitioner could be sentenced to death even if the jury believed that Shirley had committed the murder. Indeed, during post-trial proceedings Dobson admitted that his opening was in fact a statement that Thompson was guilty of capital murder.

Nevertheless, counsel presented this as their only defense. As the apparent result of their lack of preparation, counsel then failed to conduct adequate research to understand that they had to request the lesser included offense instructions of manslaughter and robbery based on those facts.

Counsel also failed to prepare to meet the allegations of the State's key witnesses. The State's case was based almost exclusively on the coerced confession and the testimony of Shirley Franklin. Yet, counsel did not hire investigators to establish facts to discredit her alibi nor did they expend the time and funds needed to obtain her conviction record, despite their awareness that Franklin was a felon. Similarly, they did not spend the time and funds needed to establish whether a deal had been struck between the prosecution and Franklin. Lacking any factual information to go on, counsel were reduced to an attempt to impeach

Franklin's testimony by alleging her provocation of other armed robberies with Petitioner.

The overall lack of preparation also marked the testimony of Petitioner. Counsel were informed by Petitioner of the coercive nature of his purported confession. Yet, counsel were not prepared to present a challenge based on these facts, and indeed failed to question Michael Thompson regarding these facts or to otherwise bring them to the trial court's attention when the court considered the admissibility of Thompson's confession.

Counsel also did not expend the time needed to research the legal standards regarding admissibility of confessions. In ruling that the confession was freely made, the trial court expressly relied upon the "collateral benefit" doctrine. The Alabama Supreme Court, however, had expressly rejected that doctrine some seven years prior to the trial in Holt v. State, 372 So. 2d 370

(Ala. 1978), which case and ruling counsel were unaware of.

Appointed counsel stated in post-trial proceedings that one of the most important tasks for a capital defense attorney is the thorough investigation of the defendant's life history. However, they also testified that they could not afford, and thus made no serious attempt to undertake, an investigation. They did not investigate the obvious dissimilarities in the physical descriptions offered by witnesses of the suspect and car and the actual appearance of Petitioner and his car; they did not seek to have the car or the victim's body examined for specimens which could have exculpated Petitioner; and they never investigated Petitioner's explanation of events showing that he was not involved in the crime.

Similarly, appointed counsel understood that, at age 16, Petitioner had suffered serious mental distress when his father was murdered in a dispute concerning a

debt owed by the murderer to Petitioner. They were also aware that this devastating event had driven Petitioner to the addictions to drugs and alcohol that continued to impede Petitioner up to the time the crime was committed. Counsel only began to realize the significance of these facts, and acted to obtain approval of a request for psychiatric support, 18 days before the trial -- fully 3 1/2 months after they were retained.

Although the psychiatric report's only unhelpful conclusion was that Petitioner was fit to stand trial, counsel were unable to evaluate or research the issues raised by the psychiatrist's report, and thus they simply decided that it was not useful. Counsel failed to recognize the relevance of the report's other conclusions, which stated that Petitioner was suffering from diagnosable psychiatric disorders: substance abuse and anti-social personality, a serious DSM III emotional disturbance or disorder. These diagnosed illnesses could have been

used as the cornerstone of a defense designed to negate specific intent. Yet, at no time did either counsel try to establish such a defense. Indeed, McPherson's post-conviction testimony revealed that he did not even recognize the possibility of such a defense.

As a consequence of having developed no legal or factual defenses, appointed counsel placed Petitioner on the stand and permitted him to testify, either without realizing or without having taken the time to advise Petitioner that he could be found guilty of capital murder and sentenced to death even if the court accepted his testimony that Franklin had been responsible for the crime. Thompson's motivation at the time was to strike out at Franklin, but, because the legal effect was unexplained to him, he only implicated himself.

Lack of preparation and planning also marked the closing arguments presented to the jury during the guilt phase. Dobson conceded that he simply never took the time to prepare

a closing argument for that phase of the trial.

A similar lack of preparation was present at the penalty phase. Counsel did not expend the time or money needed to seek out and prepare witnesses to testify at that phase. Additionally, Petitioner's mother later testified that counsel did not take any time to prepare her for her testimony during the penalty phase; their only instruction was for her to beg for mercy and her son's life.

Additionally, counsel failed to conduct the research needed to understand the legal significance and mitigating value of Petitioner's personal history in relation to the sentencing stage of the trial. At no time during Petitioner's testimony had they tried to establish that Petitioner's traumatic history had a bearing on his loss of control of his life and that the resulting use of drugs and alcohol, even on the night of the crime, would have made the imposition of a death sentence both inappropriate and

useless to achieve any valid state purpose. They similarly did not seek to establish mitigation based on Petitioner's feelings of contrition and anguish over Maisie Gray's death.

Other facts which counsel either never spent the time to learn about or never learned the significance of included that, despite having dropped out of school in the eighth grade, Petitioner had worked productively at several jobs and been considered a stable and skilled employee, that he had attempted to overcome his drug and alcohol addiction through religion, that he was a loving and caring uncle and supportive brother-in-law, and that he had also attempted to help others to overcome problems in their lives.

Consistent with that, counsel did not prepare witnesses such as Petitioner's uncle, sister-in-law, pastor, and mother, as well as a psychiatrist, to address these issues. Counsel also did not obtain Petitioner's

medical and school records. They then disregarded what available facts there were in closing argument on the penalty phase, in an argument which also had not been prepared by counsel.

All of these failures appear from the record to have resulted from a combination of lack of preparation of evidence as well as counsels' failure to spend the significant time and research needed to formulate a developed strategy founded in existing law. The resulting disorganization and lack of purpose that followed came predictably from the limited time and money counsel could afford to devote to the matter before trial.

While appointed counsel were apparently able attorneys in their own practice areas (in fact, Dobson subsequently became an Alabama state court judge), who presumably desired to present an adequate defense, appointed counsel simply did not have the time and resources necessary to

adequately represent Petitioner.⁵

Michael Thompson was found guilty of capital murder at 5:35 p.m. on Friday May 10, 1985. Thirty minutes later, at 6:05 p.m., the penalty stage began and was completed within about an hour. After argument, counsel then allowed the court to commit the gross error of instructing the jury that their verdict was merely advisory, an instruction which was particularly harmful because it was already late Friday night of Mother's Day weekend.

⁵ There is a strong inference that appointed counsel were well aware that they had not provided Petitioner with adequate counsel for such capital case. In the midst of the guilt stage of the trial, on May 8, 1985, they asked that Michael Thompson handwrite and execute the following statement:

I am satisfied with the work done by my lawyers in this case. I believe they have represented me well, and in a competent manner. I have no complaints to make. All suggestions I have made they have followed, and, they have interviewed every witness and conducted all investigations which I have requested.

The embarrassment in such an act by an attorney is rather painfully apparent.

In less than 20 minutes, the jury returned their "advisory" verdict to the judge that a death sentence should be imposed.

On appeal to the Alabama Court of Criminal Appeals and the Alabama Supreme Court, appointed counsel were similarly ineffective. Counsel failed to raise many issues on appeal which would have constituted reversible error, and which should have resulted in a successful appeal.⁶ Both courts affirmed Michael Thompson's conviction.

In February, 1990, the Circuit Court of Blount County issued an Opinion and Order rejecting Michael Thompson's Petition seeking post-conviction relief under Rule 20 of the

⁶ In the State post-conviction proceedings, these issues were raised where arguably possible on the Rule 20 appeal based on the argument that the error had never been reviewed by the appellate courts because of the lack of effective assistance of counsel. However, the Alabama courts held that those issues were waived by virtue of appointed counsel's failure to properly preserve or present them in the courts below.

Alabama Temporary Rules of Criminal Procedure ("Rule 20").⁷

In January, 1991, the Alabama Court of Criminal Appeals affirmed the trial court's denial of Michael Thompson's petition seeking Rule 20 relief.⁸ The Supreme Court of Alabama denied Michael Thompson's petition

⁷ The ineffective assistance of counsel and improperly admitted confession claims were both raised, inter alia, in the Rule 20 petition filed with the Circuit Court of Blount County on May 9, 1989. The Rule 20 hearing brought out direct and inferential testimony on the effect of the statutory financial limitations on counsel. These claims were rejected by that Court in its Opinion and Order dated February 15, 1990, which is included in the appendix to this Petition.

⁸ The appeal of the Circuit Court's rejection of Petitioner's Rule 20 petition also asserted the ineffective assistance of counsel, including raising the effect of statutory financial limitations on compensation for counsel, and improperly admitted confession claims in a brief filed with the Alabama Court of Criminal Appeals. That Court, in an opinion dated January 18, 1991 (which opinion is also included in the appendix to this Petition), again rejected Petitioner's claims.

for Review on June 21, 1991.⁹

REASONS FOR GRANTING REVIEW

- I. THE SUPREME COURT SHOULD GRANT REVIEW OF THIS PETITION TO RESOLVE SPECIAL AND IMPORTANT FEDERAL QUESTIONS RELATING TO WHETHER ALABAMA'S INFLEXIBLE STATUTORY LIMITATIONS ON COMPENSATION PROVIDED TO APPOINTED COUNSEL FOR INDIGENT DEFENDANTS IN CAPITAL CASES VIOLATE CONSTITUTIONAL GUARANTEES OF EFFECTIVE ASSISTANCE OF COUNSEL, A FAIR TRIAL, DUE PROCESS AND EQUAL PROTECTION OF LAW. SUCH REVIEW IS PARTICULARLY APPROPRIATE BECAUSE OF A CONFLICT BETWEEN THE HIGHEST COURTS OF FLORIDA AND ALABAMA ON THESE FEDERAL QUESTIONS, AND BECAUSE THESE IMPORTANT QUESTIONS OF FEDERAL LAW HAVE NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT

This court consistently has held that the Sixth Amendment requires that the States provide representation for indigent defendants that, in the totality of circumstances, works to assure that the trial court's outcome is just. See Strickland v. Washington, 466 U.S. 668, 687-688 (1984).

⁹ The ineffective assistance of counsel and improper admission of the confession issues were also raised, inter alia, in a petition for Review filed with the Alabama Supreme Court. By an Order dated June 21, 1991, that Court again rejected Petitioner's claims. That Order is included in the appendix to this Petition.

Moreover, this Court recognizes that the death penalty is "qualitatively" different from other forms of punishment. E.g., Woodson v. North Carolina, 428 U.S. 280, 305 (1976). Accordingly, it has acknowledged that "the fundamental respect for humanity underlying the Eighth Amendment's prohibition against cruel and unusual punishment gives rise to a special "'need for reliability in the determination that death is the appropriate punishment'" in any capital case." Johnson v. Mississippi, 486 U.S. 578, 584 (1988) (quoting Gardner v. Florida, 430 U.S. 349, 363-64 (1977)).

Petitioner submits that the required levels of representation and reliability are denied where the maximum fee set by a statutory scheme for payment of appointed attorneys assures that the inexperienced counsel who will be appointed to defend capital defendants will not be able to expend the time and money needed to present an adequate defense. Indeed, such statutory

limits deny counsel the time needed to research and understand the numerous legal standards affecting and benefitting their clients and to delve into the facts needed to defend their clients, and the money to hire investigators, engage in travel and retain consulting experts. All of these commitments of time and resources are fundamentally necessary to defend capital cases.

In recent years, the Supreme Courts of two States have recognized that statutory caps on compensation for appointed counsel violate or derogate the accused's right to effective representation under the Sixth Amendment. The Supreme Court of Alabama has, however, rejected such arguments. A gross disparity has therefore arisen between Alabama and other states whereby a defendant's constitutional rights in Alabama simply do not have the same meaning they have in other states. In Alabama, appointed counsel will never be able to afford to learn what those rights are and will never have the

financial resources needed to develop the facts needed to vindicate those rights.

In Makemson v. Martin County, 491 So. 2d 1109 (Fla. 1986), cert. denied 479 U.S. 1043 (1987), the Florida Supreme Court held that when applied to difficult cases, a statutory maximum fee of \$3500 paid to appointed counsel "interferes with the Sixth Amendment right to counsel." Id. at 1112. White v. Commissioners of Pinellas County, 537 So. 2d 1376, 1379 (Fla. 1989) extended the scope of Makemson by ruling that "all capital cases by their very nature can be considered extraordinary and unusual" and require a departure from statutory maximum payments. Id. at 1378. Again, the court reiterated that its primary concern was with "an indigent defendant's right to competent and effective representation, not the attorney's right to reasonable compensation." White, 537 So. 2d at 1379.

The Florida Supreme Court further emphasized that the "relationship between an

attorney's compensation and the quality of his or her representation cannot be ignored." White v. Commissioners of Pinellas County, 537 So. 2d at 1379. "It may be difficult for an attorney to disregard that he or she may not be reasonably compensated for the legal services provided due to the statutory fee limit A spectre is then raised that the defendant received less than the adequate, effective representation to which he or she is entitled, the very injustice appointed counsel was intended to remedy."

Id.¹⁰

¹⁰ Both Congress and the Bar have recognized the nexus between adequate compensation and adequate representation where capital punishment is involved.

The Criminal Justice Act of 1964 generally limits the fees available to lawyers representing indigents in federal court to \$2500. 18 U.S.C. § 3006A(d)(2). Yet, in reenacting a federal death penalty, Congress specifically provided that attorneys representing capital defendants would be entitled to reasonable compensation without being subject to any such limitation. 21 U.S.C. § 848(q)(10). The American Bar Association even more expressly has concluded that "[w]ithout adequate compensation, the right to [appointed] counsel in capital cases is merely illusory." American Bar

(continued...)

In the instant case, we need not speculate regarding the spectre of the harm. The record is too clear on that point. In spite of the natural desire of humans to defend their actions, the post-conviction testimony of Petitioner's appointed counsel demonstrates they were ever-conscious of the financial constraints imposed by the Alabama statute. Indeed, the most tragic and damning indictment of Alabama's compensation system came from one of Petitioner's appointed counsel: "I would have had to pay for it [the investigation] out of my own funds, and I had three kids in college, and I couldn't afford it."

The court of last resort of another jurisdiction has reached a similar result, relying on the same sort of analysis. In State v. Robinson, 465 A.2d 1214, 1216 (N.H.

¹⁰(...continued)

Association, Toward a More Just and Effective System of Review in State Death Penalty Cases, at p. 64 (October 1989).

1983), the New Hampshire Supreme Court lifted the statutory \$500 cap on fees in misdemeanor cases on a case-by-case basis in order to avoid unfairness and unreasonableness to the attorney and also to "adequately protect both the indigent defense fund and the right of an accused citizen to effective assistance of legal counsel."¹¹

Yet, in Ex Parte Grayson, 479 So. 2d 76 (1985), cert. denied Grayson v. Alabama, 474 U.S. 865 (1985) the Alabama Supreme Court rejected an argument that statutory maximum payments violate rights of adequate

¹¹ In many states, of course, this issue never will be confronted because adequate compensation schemes have been legislatively created to vindicate the Sixth Amendment right to counsel. See, e.g., Cal. Penal Code § 987.2 (appointed criminal defense counsel "shall receive a reasonable sum for compensation and for necessary expenses"); Tex. Crim. Proc. Article 26.05 (reasonable fees and expenses for all reasonable and necessary time spent on the case.) In other states, the courts have found statutes which place maximums on fees paid to appointed counsel unconstitutional on other grounds. State ex rel. Stephen v. State, 242 Kan. 336, 747 P.2d 816 (1987) (inadequate compensation of appointed attorneys is unconstitutional taking); DeLisio v. Superior Court, 740 P.2d 437 (1987) (same).

representation, due process, and equal protection. That decision is now settled law in Alabama. The inevitable result of the decision in Grayson is borne out here. Indigent prisoners in Alabama receive a level of representation which the highest courts of other states have found constitutionally invalid. In fact, courts in both New Hampshire and Florida applying constitutional standards would in certain cases authorize more money for the defense of a misdemeanor case than an Alabama court could authorize for a capital case. This virtually unbelievable discrepancy, when coupled with the performance of trial counsel below, requires that certiorari be granted so that the issues raised by this case can be fully briefed and argued.

Petitioner additionally submits that this systemic problem cannot be corrected through the application of the case-by-case constitutional standard regarding the effective assistance of counsel set forth in .

Strickland v. Washington, 466 U.S. 668 (1984). That standard seeks to ascertain whether counsel failed to possess or to employ "such skill and knowledge" or make a reasonable effort to "render the trial a reliable adversarial testing process."

Strickland, 446 U.S. at 688.

However, in spite of the wide-ranging failures of appointed counsel to carry out their obligations to Petitioner, both the Alabama Court of Criminal Appeals and the Alabama Supreme Court found that skill, knowledge and effort of appointed counsel were adequate to meet the Strickland standard. Thompson v. State, 581 So.2d 1216, 1219 (Ala. Crim. App. 1991), cert. denied No. 1900927 (Ala. June 21, 1991).¹² Petitioner

¹² Those failures by appointed counsel included the following: (1) developed no defense strategy and presented no theory of defense; Strickland v. Washington, 466 U.S. 668 (1984); Magill v. Dugger, 824 F.2d 879, 884-885 (11th Cir. 1987); (2) failed to investigate their client and the case against him, Magill, 824 F.2d at 886 n.11, 889-890; Thompson v. Wainwright, 787 F.2d 1447, 1450 (11th Cir. 1986), cert. denied 481 U.S. 1042 (continued...)

submits that the conclusion of those courts is simply another way of saying that the performance of appointed counsel in this case was similar to that of other such appointed

¹²(...continued)

(1987); (3) neglected to present facts regarding Thompson's repeated refusal to waive his rights; (4) did not understand the applicable law regarding the consequences of Thompson's testimony and their arguments; (5) failed to know that the Alabama Supreme Court had rejected the legal doctrine explicitly relied on by the trial court in admitting the confession; (6) neglected to prepare Michael Thompson for his trial testimony; MaGill, 824 F.2d at 889-90; (7) failed to prepare closing arguments for either trial phase; (8) repeatedly failed to object to the actions of the prosecution; United States v. Lamerson, 457 F.2d 371, 372 (5th Cir. 1972); (9) offered statements suggesting that Petitioner had an extensive criminal background; (10) failed to investigate or present key mitigating facts; Mathis v. Kant, 704 F. Supp. 1062, 1063 (N.D. Ga. 1989), amended in part 708 F. Supp. 339 (N.D. Ga. 1989); (11) failed to prepare for the penalty phase; King v. Strickland, 714 F.2d 1481, 1490-91 (11th Cir. 1983); (12) made statements emphasizing that the crime was heinous and that counsel were appointed by the court; King v. Strickland, 714 F.2d at 490; Mathis v. Kant, 704 F. Supp. at 1063-64; (13) failed to investigate and offer mitigating evidence; California v. Brown, 479 U.S. 538, 545 (1987); (14) made no effort to investigate and develop a viable approach to the defense; Thomas v. Kemp, 796 F.2d 1322, 1324 (11th Cir. 1986), cert. denied 479 U.S. 966 (1986); and, (15) offered no psychiatric evidence.

counsel which those courts have reviewed. As opposed to being an endorsement of the reliability of the system, it points to the systemic failure to provide meaningful representation to indigent capital defendants in Alabama.

Moreover, the most insidious problem with providing inadequate compensation to the attorneys and no funds to pay for investigations and other necessary expenses is that its effect is normally difficult or impossible to identify, especially because there is such a natural desire by well-meaning appointed counsel to argue that they still did an adequate job. We are fortunate that trial counsel in this case made so clear, if Petitioner could have paid that same attorney reasonable rates for his services -- so the attorney could pay his children's college bills -- Petitioner would have received far better representation than he got. The question is thus inescapable as to whether a system can be constitutionally

sound when the representation afforded a capital defendant is below that found in a standard commercial matter in rural Alabama. See, Griffin v. Illinois, 351 U.S. 12, 19 (1956) ("[t]here can be no equal justice where the kind of trial a man gets depends on the amount of money he has").¹³

In setting a maximum fee of but \$1000 for pre-trial work performed by appointed counsel of capital defendants, the Alabama legislature has moreover ignored the express

¹³ Indigent defendants such as Petitioner are often represented by lawyers who are "handicapped by a system that provides disincentives to thorough and effective representation." The National Law Journal, June 11, 1990, at 35, col. 4. Frequent shortfalls at trial include "inadequate penalty phase investigation, unskilled voir dire, lack of affirmative defenses in both phases, [and] failure to object and to preserve issues for appeal." Id. at 36, col. 1. "[A]ggravating defense counsel's lack of experience is Alabama's compensation system The State pays appointed defense counsel \$20 per hour for out-of-court time, with a cap of \$1,000 per trial phase, and \$40 per hour for in-court time (no cap) and 'reasonable' expenses. Although all reasonable expenses are to be reimbursed, lawyer after lawyer insisted funds were inadequate and that judges made clear very early there were limits." Id. at 36, col. 1.

guidance of this Court to ensure the reliability of the state's capital punishment system in order to meet the requirements of the United States Constitution. See Johnson v. Mississippi, 486 U.S. at 363-64. The Alabama Supreme Court has perpetuated the problem by failing to correct that error.

Finally, under circumstances such as these, it is hardly surprising that Petitioner's counsel failed to give him effective representation. Their admitted lack of experience in capital cases, combined with severe financial constraints, posed almost insurmountable obstacles. Although it is true that the state is not, and indeed cannot be, required to provide indigent defendants with the best representation that money can buy, the representation provided by Alabama's statutory scheme falls so far short of adequate that Petitioner's due process right to a fair trial was violated.

Petitioner thus requests that this Court grant certiorari to determine whether

mandatory fee caps in capital cases, when coupled with the distinct threat they pose to effective assistance of counsel, violate the accused's Sixth Amendment right to effective assistance of counsel, as well as the Fifth and Fourteenth Amendment right to due process and equal protection of law. Pursuant to Supreme Court Rule 10.1(b), issuance of a writ of certiorari is appropriate in this case to resolve a conflict between the decisions of sister States on a federal question. Certiorari is also appropriate because this Court has never determined whether fee caps violate constitutional guarantees afforded capital defendants.

II. THE SUPREME COURT SHOULD GRANT REVIEW OF THIS PETITION TO RESOLVE SPECIAL AND IMPORTANT FEDERAL QUESTIONS RELATING TO WHETHER A STATE MAY MEET ITS BURDEN OF PROVING THE WAIVER OF RIGHT TO COUNSEL AND THE VOLUNTARINESS OF A CONFESSION MERELY BY REFERRING TO THE STATE OF FACTS AT THE MOMENT THE WAIVER AND CONFESSION ARE OBTAINED OR WHETHER IT IS REQUIRED TO ESTABLISH THAT THE CUSTODIAL PERIOD IN ITS TOTALITY IS NON-COERCIVE. SUCH REVIEW IS ESPECIALLY APPROPRIATE BOTH BECAUSE THESE IMPORTANT ISSUES OF FEDERAL LAW HAVE BEEN DECIDED BY THE ALABAMA COURTS AND HAVE NOT BEEN, BUT SHOULD BE, DECIDED BY THIS COURT, AND BECAUSE THE ALABAMA COURT DECISIONS CONFLICT WITH EXISTING DECISIONS OF THIS COURT.

A. The State Court's interpretation of the degree of evidence needed to prove that Petitioner's alleged waiver of right to counsel and alleged confession were voluntary violates constitutional requirements.

When an accused asserts his right to counsel, the State has the burden of proving the existence of a voluntary waiver.

Michigan v. Jackson, 475 U.S. 625 (1986)

("[I]t is the State that has the burden of establishing a valid waiver"); Johnson v.

Zerbst, 304 U.S. 458 (1938) (heavy burden on

the state to prove waiver of constitutional rights). It is similarly well settled that the State has the burden of proving the voluntariness of an accused's confession. Lego v. Twomey, 404 U.S. 477 (1972).

In Miranda v. Arizona, 385 U.S. 436, 475 (1966), this Court gave the rationale for placing such a burden on the State:

Since the State is responsible for establishing the isolated circumstances under which the interrogation takes place and has the only means of making available corroborated evidence of warnings given during incommunicado interrogation, the burden is rightly on its shoulders.

Id. at 475.

The burden thus is on the State to prove that the methods used to obtain both the waiver of right to counsel and any confession do not violate the fundamental fairness requirements of due process. Generally, courts are to indulge in every reasonable presumption against waiver of such fundamental constitutional rights. See e.g., Brewer v. Williams, 430 U.S. 387, 405 (1977); Brookhart v. Janis, 384 U.S. 1, 4 (1966).

Recognizing the frequently conflicting evidence on the issue of voluntary waivers, the Court in Michigan v. Jackson specifically reasoned:

[W]e should "indulge every reasonable presumption against waiver of fundamental constitutional rights." (citation omitted). . . Doubts must be resolved in favor of protecting the constitutional claim. This settled approach to questions of waiver requires us to give a broad, rather than a narrow, interpretation to a defendant's request for counsel. . . .

Michigan v. Jackson, 475 U.S. at 634.

In spite of the strong and clear guidance provided by this Court, the Alabama courts have found that the State sustained its burden of proving the voluntariness of both Petitioner's alleged waiver of his right to counsel and alleged confession based solely on the testimony of a single sheriff who admittedly only saw Petitioner during the last few minutes of the over twenty-four hours of incarceration prior to the alleged waiver, and who only testified as to what took place in his presence. The State failed to produce any evidence which would establish

that the State's conduct was not coercive during the remainder of the approximately twenty-four hours that Petitioner was in custody. In fact, the State even withheld the crucial document, the waiver of rights form that Petitioner refused to sign after being taken into custody, which so strongly suggests that Petitioner's waiver and confession were not voluntary. See North Carolina v. Butler, 441 U.S. 369 (1979).

Moreover, the findings of such waiver and voluntariness were sustained at the post-trial hearing in spite of the State's admitted violation of the Brady rule, the uncontradicted documentary and oral evidence of Petitioner regarding his repeated assertions of the right to counsel and to remain silent and the coercion and trickery tactics used to obtain a confession.

Petitioner thus submits that his Petition should be granted to vindicate these key constitutional rights. More specifically, the State's burden of proof

should be expanded to require the State to unequivocally establish the absence of coercion during the entire period of custody and not just during a time fragment convenient to the State, when a "clean" witness can come in at the last minute to look at a "set stage" and say that no coercion was present.

Further, a second principle should be established to require the State to prove that, once a prisoner refuses to waive his rights, nothing has occurred between the time of the refusal to waive rights and the waiver which could have had a coercive effect on the defendant.

- B. Both the alleged waiver of the right to counsel and the alleged confession were the direct result of coercive tactics designed to overbear the will of Petitioner, and thus were involuntary.

It is well established that the State must clearly show "an intentional relinquishment or abandonment of a known right or privilege" in order for a waiver of a right to counsel to be valid. See e.g.,

Brewer v. Williams, 430 U.S. 387, 405 (1977);
Johnson v. Zerbst, 304 U.S. 458, 464 (1938).
This Court in Edwards v. Arizona, 451 U.S.
477 (1981), summarized the voluntariness test
applied to waivers of right to counsel as
follows:

It is reasonably clear under our cases
that waivers of counsel must not only
be voluntary, but must also constitute
a knowing and intelligent
relinquishment or abandonment of a
known right or privilege, a matter
which depends in each case "upon the
particular facts and circumstances
surrounding that case, including the
background, experience, and conduct of
the accused."

Id. at 482. (citations omitted).

In Edwards, defendant asserted on the
evening of his arrest his right to counsel
and his right to remain silent. On the
following morning, the police, without first
furnishing him with counsel, interrogated
defendant and ultimately obtained
incriminating admissions. This Court, in
holding that the questioning by the police on
the following morning violated defendant's
rights under the Fifth and Fourteenth

Amendments, made clear that a bright-line rule applies with respect to an individual's right to counsel:

[W]hen an accused has invoked his right to have counsel present during custodial interrogation, a valid waiver of that right cannot be established by showing only that he responded to further police-initiated custodial interrogation even if he had been advised of his rights. We further hold that an accused, . . . having expressed his desire to deal with the police only through counsel, [shall] not [be] subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police.

Id. at 485; see also Arizona v. Roberson, 486 U.S. 675 (1988); Fare v. Michael C., 442 U.S. 707 (1979) ("rigid rule that an accused's request for an attorney is per se an invocation of his fifth Amendment rights, requiring that all interrogation cease").

The trial court, by placing almost exclusive reliance on evidence that the State, through Sheriff McDowell, had finally obtained a waiver of Miranda rights, failed to give constitutionally adequate consideration to the facts and circumstances

surrounding the alleged waiver. Yet these are precisely the circumstances which demonstrate improper State action in this instance. This Court, recognizing the significance of prestatement police tactics, has stated:

[w]hatever the testimony of the authorities as to waiver of rights by an accused, the fact of lengthy interrogation . . . before a statement is made is strong evidence that the accused did not waive his rights. In these circumstances the fact that the individual eventually made a statement is consistent with the conclusion that the compelling influence of the interrogation finally forced him to do so Moreover, any evidence that the accused was threatened, tricked or cajoled into a waiver will, of course, show that the defendant did not voluntarily waive his privilege.

Miranda v. Arizona, 384 U.S. at 476.

This Court has repeatedly denounced in subsequent decisions tactics similar to those used by the State in this instance.

Moran v. Burbine, 475 U.S. 412 (1986) (waiver of Miranda rights must be "voluntary in the sense that it was the product of a free and deliberate choice rather than intimidation, coercion, or deception"); Berkemer v.

McCarty, 468 U.S. 420 (1984) ("The purposes of the safeguards prescribed by Miranda are to ensure that the police do not coerce or trick captive suspects into confessing."); see generally Miranda, 384 U.S. at 448-456.

Here, the State was unable to obtain Petitioner's waiver and confession for a period of twenty-four hours after he was taken into custody. During his initial custodial interrogation, he asserted his rights to remain silent and to counsel, resisting the State's efforts to obtain from him a signed waiver of rights form. Unsuccessful in their first night of efforts, the State switched to more deceptive tactics of custodial interrogation in an attempt to obtain a waiver. The State's use of Shirley Franklin, who was placed in handcuffs despite not being under arrest, in an attempt to obtain Petitioner's confession is the functional equivalent of custodial interrogation. In Rhode Island v. Innis, 446 U.S. 289 (1980), this Court stated the test

for determining custodial interrogation as follows:

any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect [constitute interrogation].

Id. at 301.

Unlike Innis,¹⁴ there is no innocent or casual explanation for the calculated tactics used by the State to obtain Petitioner's confession, and thus there is no basis for rejecting the instant petition. Rather, it is uncontroverted that the police, after Petitioner's assertion of his Miranda rights, continued their custodial interrogation of Petitioner after a limited break in time and without the presence of counsel. See Edwards v. Arizona, 451 U.S. at

¹⁴ In Innis, defendant, after asserting his Miranda rights, incriminated himself after a policeman made an innocuous comment to a fellow police officer which was overheard by defendant.

485, 486.¹⁵

Moreover, waiver and voluntariness were found although a further inference adverse to the State existed due to its failure to produce any witnesses to rebut Petitioner's testimony regarding the tactics used to extract the statement. The unexplained failure by a party to produce a witness who has peculiar knowledge of an event is valid grounds for an adverse inference against the nonproducing party. See Graves v. United States, 150 U.S. 115 (1893). Mere physical availability of a witness to the opposing party does not alter

¹⁵ Any factual claim that one officer did not know of Petitioner's assertion of his right to counsel moreover would be without merit. The state's knowledge regarding an accused's assertion of the right to counsel, as well as the right to remain silent, is imputed from one state officer to another. Michigan v. Jackson, 475 U.S. 625, 634 (1986) ("Sixth Amendment principles require that we impute the State's knowledge from one state actor to another."). See also Arizona v. Roberson, 486 U.S. 675 (1988) (rule extended to cover even subsequent interrogations conducted by different officers concerning a separate offense).

that negative inference "where the witness has a relationship with the opposing party 'that would in a pragmatic sense make his testimony unavailable to the opposing party regardless of physical availability.'"

United States v. Mahone, 537 F.2d 922, 926 (7th Cir. 1976) (citations omitted).¹⁶

Taken together, the actions by the State should have compelled the Alabama courts to conclude that Petitioner's waiver did not meet the test of voluntariness, which this Court recently reiterated:

"Is the confession the product of an essentially free and unconstrained choice by its maker? If it is, if he has willed to confess, it may be used against him. If it is not, if his will has been overborne and his capacity for self-determination critically impaired, the use of his confession offends due process."

Arizona v. Fulminante, ___ U.S. ___, 111 S.

¹⁶ The Court in Mahone found that although the police officer whose absence gave rise to the adverse inference was outside the courtroom, he had a special relationship with the prosecution, arising out of his interest in seeing a conviction, such that he could not be considered "equally available" to the defense.

Ct. 1246, 1261 (1991). (citations omitted).

Petitioner submits that the Alabama courts have redefined the State's burden of proving waiver in a manner which violates his rights under the Fifth, Sixth and Fourteenth Amendments.

Petitioner also submits that the coercive conduct of the police destroyed any defense he had based in the facts of the case. It was thus only predictable that his reasonable anger was taken out on their accomplice, Shirley Franklin, at trial after the confession was admitted into evidence. In these circumstances, that subsequent trial testimony was in the truest sense possible "tainted" by the earlier coerced confession so as to render it constitutionally unreliable. Miranda, 384 U.S. at 314; see Wong Sun v. United States, 371 U.S. 471 (1963). It therefore should also be excluded from the evidence at a retrial of this

case.¹⁷

- C. The granting of certiorari in this case would not be a mere academic exercise since erroneous introduction of the involuntary confessions caused harm to petitioner's constitutional rights.

This Court has most recently held in Arizona v. Fulminante, ___ U.S. ___, 111 S.Ct. 1246 (1991), that the admission into evidence of an involuntary confession is subject to reversal if such evidence was in any way harmful to defendant. Recognizing the damning effect of a confession, this Court stated:

A confession is like no other evidence. Indeed, "the defendant's own confession is probably the most probative and damaging evidence that can be admitted against him." (citations omitted) . . . While some statements by defendant may concern isolated aspects of the crime or may be

¹⁷ Likewise, the statement alleged by government investigator Larry Fowler to have been made by Petitioner immediately before Petitioner was to see his appointed counsel for the first time (approximately three days after he asserted his right to counsel) was improperly admitted. Such a statement, if made at all, violated both his right to counsel and his right to remain silent. Michigan v. Mosley, 423 U.S. 96, 105-106 (1975).

incriminating only when linked to other evidence, a full confession in which the defendant discloses the motive for and means of the crime may tempt the jury to rely upon that evidence alone in reaching its decision.

Fulminante, 111 S. Ct. at 1257-1258. Given the profound impact of a confession on the jury, the State cannot claim that the involuntary confessions allowed into evidence were harmless to Petitioner beyond a reasonable doubt. See Chapman v. State of California, 386 U.S. 18 (1967) (federal constitutional error is harmless only if proven beyond a reasonable doubt).

Indeed, but for the confession, the State's case would have rested almost exclusively on the testimony of Petitioner's estranged girlfriend, a convicted felon who likely had a financial stake in the outcome of the trial because of rewards offered to solve the crime, and who the Sheriff's Department had recommended for the reward in writing after the trial. Such testimony standing alone thus would be highly suspect, as it should be, making the harm to

Petitioner of the admission of his coerced testimony severe. Thus, the granting of the petition in this case will additionally correct a wrong committed by the judicial system of Alabama.

CONCLUSION

Michael Thompson respectfully requests that his petition for writ of certiorari be granted to review the important federal questions raised by this petition. The need to ensure that other criminal defendants in Alabama cease to suffer from the inherent wrong of grossly undercompensated counsel and underfunded defenses provides a compelling basis for the granting of this petition. Moreover, Petitioner submits that the facts underlying this petition demonstrate that there is a clear need to provide further guidance to courts throughout the United States as to the State's burden of demonstrating the lack of coercion throughout the custodial period,

thus providing a compelling independent
reason for the granting of this petition.

Respectfully submitted,

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